THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MARCH 26, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

ELSEWHERE we print an interesting case—Connor v. The Chicago, Rock Island & Pacific Railroad Company, decided by the Supreme Court of Missouri, in which Mr. Justice Napton takes occasion (for himself only—the other judges disagreeing with him) to dissent from the construction placed upon the Missouri "damage act," by the Supreme Court of Missouri, in Schultz v. Pacific Railroad, 36 Mo. 13. The interesting and useful note which we append to this case was prepared by Wm. P. Wade, Esq., of Kansas City, Mo., who will hereafter contribute occasional articles to our columns. The pen-picture which he presents of the manner in which crude and unintelligible legislation is inflicted upon the country may seem to some overdrawn; but upon careful consideration, we do not think it is. We think Mr. Wade simply "holds the mirror up to nature," and does not overstate the truth in any degree.

JURISDICTION OF CONSULS-GENERAL OF THE GERMAN EMPIRE.—An action was recently commenced in the Marine Court of New York city, presided over by Judge Joachimsen, by Albert Weise, by his guardian, against William Junker, chief mate of the German bark Philip Meyerzang, to recover damages for an assault and battery committed on board said vessel. The German consul-general, Dr. Schumacher, intervened by counsel, and, in support of his own claim of exclusive jurisdiction in the premises, moved to dismiss the cause for want of jurisdiction. It was held, first, that he could properly intervene. But the second and main question depended on the construction of article 13 of a subsisting treaty between the United States and the German Empire, which contains the following language: "Consuls-general * * * shall have the exclusive power to take cognizance of, and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers and crews, and specially in reference to wages and the execution of mutual contracts. Neither any court nor authority shall, on any pretext, interfere in those differences, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore." It was held that the injury complained of was a "difference of a nature to disturb the peace and public order in port or on shore," and the motion was denied. The opinion of Judge Joachimsen is reported in the N. Y. Daily Register, for March 13.

POWER OF A (FEDERAL) COURT OF EQUITY TO ENJOIN THE HOLDING OF A MUNICIPAL ELECTION.—Application was recently made to Judge Bond of the United States Circuit Court, sitting at Raleigh, North Carolina, in a case docketed as Holmes *et al.* v. Gay *et al.*, to enjoin defendants, who were registrars and poll-holders of election in the city of Wilmington, N. C., from registering voters or holding an election under an amended charter of that municipality—recently granted by the legislature. The reason alleged by the complainants why this remedy should be given, was that the law amending the former charter of that city was unconstitutional: 1. Because the districts into which the city is divided are largely unequal in proportion, though they have the same representation in the city council, and that this is particularly true of the colored population, which, in the 3rd district, is by itself, as large as the population of both the other districts. 2. Because the amended charter prescribes other qualifications for voters than are prescribed for voters in the constitution of the state, which are particularly oppressive to the colored people.

Judge Bond, in refusing this application, used the following language.

> Whatever may be said of the propriety or impropriety of the legislation in question, we are of opinion that the remedy sought for is not a proper one. There is no special wrong or irreparable damage alleged to be done or threatened to the complainants in person or property; but the injury threatened is stated to be the fear of great disorder and confusion, which would arise where there were two contending bodies claiming to be the common council, and to be entitled to the government of the city. The remedy for this is the writ of *quo warranto*, brought by those out of possession of the office against those who hold it, and we know of no case where a court of equity has interposed by injunction to prevent an election upon such general grounds of fear common to all citizens, even if the law under which it was about to be held was clearly unconstitutional. As is said by the Supreme Court of the state of Pennsylvania, in Smith & McCarthy's 6th Equity Reports, "the power ought to be plain to authorize courts to forbid municipal elections when ordered by the legislature," and we may add that before they exercise it, there should be some threatened irreparable damage to the person or property of those who seek the remedy. If this election be an illegal, unconstitutional one, the remedy by *quo warranto* is complete. If it be a legal one and the complainants or any of the citizens are deprived of their rights under the 14th or 15th amendments of the constitution of the United States, there is ample remedy in the courts by indictment and otherwise, under the acts of May 30th, 1870, and February 28th, 1871, to punish the wrong done, and to restore the rights of the parties.
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> We think the injunction must be refused.

Death of Judge Longyear.

It is with sincere regret that we announce the death of Hon. John W. Longyear, judge of the United States District Court for the Eastern District of Michigan, which occurred at Detroit on the 12th instant. "Judge Longyear was born," says the Chicago Legal News, "on the 22d of October, 1820, in Ulster county, New York. He received a good academic education. In 1844 he went to Michigan and located at Mason, where he studied law with Daniel L. Case. He was admitted to the bar in 1846, and settled in Lansing, at which place the capital of the state was soon after located. He made his home at Lansing for nearly twenty-five years. It was here he acquired his reputation as a lawyer. In 1862 he was elected to Congress from the third district, and re-elected in 1864. In 1867 he served as a member of the constitutional convention, and took an influential part in the deliberations of that body." In 1870 he was appointed to the position which he held at the time of his death. Owing to the blindness of Judge Emmons, he sat, during the last year, much of the time as sole judge in the circuit court, where he delivered many of his most admired judgments. Several of these it was our privilege to publish in the first volume of this journal, and many of them were also published in the Chicago Legal News, and in the American Law

Times Reports. Unquestionably he was one of the ablest judges on the federal district bench. His decisions in bankruptcy and admiralty are quoted with great respect in other courts. His death is a loss which will be felt outside of the district in which he sat; and it will be fortunate for the court over which he presided, if a successor can be found worthy to fill his place.

Naturalization—Religious Tests.

Sometime since (1 CENT. L. J. 514), we had occasion to commend Mr. Chief Justice McKean, of Utah, for refusing a decree of naturalization to a Norwegian, who "knew of no *constitutional* law against polygamy." This was not making any religious test. The regulation of society which provides that one man shall have no more than one wife, is many centuries older than Christianity, and was firmly settled in the laws and policy of the Romans at a time when they worshipped as many gods as there are stars in the firmament. Monogamy being the main pillar which supports the civilization of Europe and America, and distinguishes it from Oriental barbarism, Judge McKean very properly concluded, when a candidate for naturalization avowed his belief in the lawfulness of polygamy, that he was not "well-disposed to the good order and happiness" of the American people, and that we could hence dispense with his services as a voter.

But the case was far different when a bigoted judge of an inferior court, in Philadelphia the other day, rejected the application of an otherwise proper candidate for naturalization, *on account of his being an infidel!* We reprint from the Philadelphia Sunday Times the following statement of this matter:

> Julius Nieland, residing at 410 North Tenth street, made application to Judge Ludlow, in the quarter sessions yesterday, to be naturalized. His petition was filled up by a clerk in the court. F. Bulefeld made oath that Julius Nieland had been five years a resident of the United States, and one year of the state of Pennsylvania. Upon the parties appearing before Judge Ludlow, who was sitting in court-room No. 2, he ascertained that the petitioner was an unbeliever, and endorsed upon the petition:
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> "*Refused on account of being an infidel.*"

It need scarcely be suggested that neither the constitution of the United States, nor the naturalization acts, furnish any warrant for the rejection of an applicant for naturalization on account of his religious belief or lack of religious belief. A man may be an "infidel," and yet, in the language of the naturalization act (2 Stat. 153), "of good moral character, attached to the principles of the constitution of the United States and well-disposed to the good order and happiness of the same." Many of our most learned men and most estimable citizens are undoubtedly "infidels," in so far as they disbelieve in miracles and in the divine authenticity of the Scriptures. These men may be in dangerous error; but shall men of good moral character, and attached to the principles of our government, be refused citizenship because of their honest opinions on questions which are beyond the grasp of the human intellect, and as to which the opinion of the wisest man is of no more value than that of a child? Judge Ludlow's proceeding in investigating the religious opinions of this applicant, and in making a religious test of citizenship, when no such test is made by the constitution and laws, was an unmitigated outrage, such as should be visited with universal condemnation. It is a foretaste of what we shall have if the "reformers" succeed in getting into the constitution of the United States an amendment recognizing God and the Christian religion.

The Law of Telegraphs.

The constant growth of telegraphy as a popular institution, and as an agency for commercial operations, has naturally given rise to many adjudications on the subject. Considering the diversity of judicial opinion, it may be considered as virtually *res integra*, and, therefore, ripe for original discussion. Of the many questions that have arisen, I will select only the one which I deem of the most importance for consideration in this article, viz.: the relation of telegraph companies to the public.

As an evidence of the distracting state of this question it is only necessary to say that there are at least three classes of decisions, each tending in a contrary direction and asserting opinions totally incompatible with each other.

The principle derived from the first class of decisions, is that telegraph companies are to be considered as common carriers, and bound to their extraordinary responsibilities. Parks v. Alta Telegraph Company, 13 California, 432; Brown & McNamee v. Lake Erie Telegraph Co., 1 Am. Law Reg. 685; McAndrew v. Elec. Tel. Co., 33 Eng. Law & Eq. 180. In the last case above it was decided that their duties were in the nature of those of common carriers, which would not seem to imply quite so much as the other cases, but as the reasoning upon which it is based is the same, I have classed them together.

The rule laid down in the second class of cases, is that they are not common carriers in the strict sense of that term, but owe duties to the public and hold relations to the public that are very similar. The cases that thus hold are numerous. I cite a few of them: Birney v. N. Y. & Washington Pr. Tel. Co., 13 Allen, 226; DeRutte v. N. Y. & Albany Elec. and Magnetic Tel. Co., 1 Daly, 547; 30 How. Pr. 403; 1 Allen Tel. Cas. 273, S. C.; Breese & Munford v. United States Telegraph Co., Allen Tel. Cases, 66ℰ.

The third principle, derived from adjudications on the subject, is that they are bound to the public in no other manner or sense than an individual is bound. The first case in support of this doctrine was the celebrated case of Leonard v. New York Telegraph Co., 41 N. Y. Rep. 552. It has been recently followed and approved by Appleton, J., in his learned opinion in the case of True v. International Telegraph Co., reported in Chicago Legal News, Vol. 5, p. 170.

I think the doctrine of these last cases the most reasonable. I think the conclusions at which they arrive are more in accordance with the liberal views of modern jurisprudence, and follow more logically from all the arguments advanced *pro* and *contra*. The principal argument advanced by those who seek to hold telegraph companies to the responsibilities of common carriers, is their public character. But this argument is not sufficient. It is only one of the premises of a logical syllogysm. They have assumed that all persons, or companies, who hold themselves out to the public to do a certain business, are insurers by implication of every thing of any value that comes into their possession, or under their control; and, therefore, in the absence of contract, are liable for any default or accident that may happen to their

charge, not occasioned by the act of God, or the public enemy. But such is not the case. In the case of The Bank of the United States v. The Planters' Bank of Ga., it was held, that whether organized under general laws or under special acts of incorporation, telegraph companies are private corporations, and that this would be so whether the state were the principal or the sole owner of the stock.

Newspapers hold themselves out to the public as advertising mediums, publishing their terms, and are certainly bound to advertise for any body who will pay them the published rates, provided the advertisement is not in itself objectionable; but no one would attempt to hold them bound in damages, in case of breach, beyond the amount paid for their services. They are liable to this extent, because they have made a public offer, and whoever brings them advertising will be deemed to have accepted their terms. In such a case no one would be so fanatical as to claim the damages which might result from a failure to advertise, beyond the amount paid or due, with interest, however proximate the damage.

So with persons who hold themselves out to the public as partners; whoever trusts them in that character binds them, though no partnership does actually exist. The same is true where one allows another to conduct himself as his agent without dissent; he is bound to all who trust such person in that capacity. In these cases they are bound *ex-contractu*, and not because of that much abused term "public policy," but because *qui tacet consentire videtur*. The same obligation precisely exists by reason of the public nature of telegraph companies. They have publicly offered themselves to send messages for such as choose to employ them, and any person who offers them employment has accepted this public proposition, and has bound them accordingly. They are indeed bound by public policy in one sense; but it is simply that public policy which binds every man to discharge his obligations, whether such obligations are evidenced by a written bond or are implied from the acts or situation of the parties. This is very fully expressed by Appleton, J., in True v. International Telegraph Company, reported in the Chicago Legal News, vol. 5, p. 170, where he says: "Indeed the general liberty to contract is the highest public policy." This was a case in which True had employed the telegraph company to send a dispatch to parties in Baltimore. The blank on which the telegram was written, bore on its margin a notice stating that the amount of damages to be recovered in case the message was not properly sent, should be forty-eight cents, the price paid for the transmission of the message. Upon the question raised on this point, the court said: "Here is a contract. The consideration is sufficient. It is entered into by parties competent to contract. There is no statute prohibiting. It is a contract for the liquidation of damages, and if there is anything parties can do without let or hinderance, it is to agree in advance upon the measure of damages to be paid in case of a violated contract. Whether the damages agreed upon be large or small, it is a matter for the contracting parties, and for them alone. If they are satisfied with large or small damages, it matters not to any one else." If telegraph companies can thus insert any condition they see fit into a contract, why call them common carriers or seek to apply to them the rules of common carriers? If they can make their liabilities differ from those of common carriers in one instance, they can make them so differ in all instances, and a liability from which a party can relieve himself at pleasure, is no liability at all.

Another question upon which the main question is dependent, is whether there exists between the contracting parties the relation of bailor and bailee. Chancellor Kent defines a bailment to be "a delivery of goods in trust upon a contract expressed or implied, that the trust shall be duly executed, and the goods returned to the bailee as soon as the purpose of the bailment shall be answered." There must be something of which the bailee can take possession—something tangible and of value. What is a telegraphic dispatch? Is it matter? No; for it may be sent a thousand miles in an instant, which is impossible of any material substance. The piece of paper upon which the message is written is certainly not the thing bailed; for it never goes, and is merely a passive instrument in the hands of the operator to execute his delicate undertaking. The thing to be done, that is, the sending of the message, is the subject of the contract and not the piece of paper. In the case of Leonard v. The New York, etc., Telegraph Co., Hunt, J., said: "He (the telegraph company) has no property intrusted to his care; he has nothing which he can steal or which can be taken from him. There is no subject of concealment or of conspiracy. He has in his possession nothing which, in its nature and of itself, is valuable. It is an idea—a thought—a sentiment, invisible, impalpable, not the subject of sale or theft, and, as property, quite destitute of value. He can not himself see, hear or feel the subject of his charge."

That they are liable in damages for any misfeasance or failure in the absence of any conditions exonerating them, has never been denied; but this liability does not grow out of the public nature of their employment, but because they have undertaken something implying and requiring a high degree of care and skill, and because such care and skill may be reasonably expected. The measure of damages in these cases is laid down by Earle, J., in the case just mentioned: "The difficulty is not so much in laying down general rules as in applying them. The cardinal rule undoubtedly is, that the one party shall recover all the damages which have been occasioned by the breach of the contract by the other party.

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It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be *supposed* to have contemplated when they made the contract." The same rule was observed with respect to damages in the following cases: Stevenson v. Montreal Telegraph Company, 16 Upper Canada Rep. 530; Kingham v. Montreal Telegraph Company; Landsberger v. Magnetic Telegraph Company, 32 Barb. 530; Gildersleeve v. United States Telegraph Company, Md. Court of Appeals.

It will be observed that these are merely old principles applied to new cases. This digression is made for the purpose of showing that, since the remedy for a breach of this contract is the same as with ordinary violated contracts, the distinction is purely artificial. As the measure of damages, in case of a breach, is supposed to enter into the minds of the contracting parties, thus forming, to all intents and purposes, a part of the contract, why make this artificial distinction be-

tween the *rights* of the parties because one of them happens to be engaged in a public business?

I think it is clear that telegraph companies are not common carriers. The nature of their employment is a hiring. One party promises to give money and the other promises to perform a certain kind of service requiring a certain degree of knowledge and skill, and if he fails to use that knowledge and skill, then he is liable to the first party for the consequences. But this liability does not grow out of, or depend on, his public character, but out of the law of contracts as it is administered to every citizen in a state.

T. C. SPELLINGS.

Mormon Divorces—Alimony Pendente Lite.

We publish elsewhere an opinion of Chief Justice McKean of Utah territory, in an interesting and curious case, wherein Ann Eliza Young, twentieth or thirtieth wife of Brigham Young, the head of the Mormon church, having brought suit for divorce, moves for alimony *pendente lite*. The defence to the suit for divorce, is that there has been no marriage; that the defendant was lawfully married to Mary Ann Angell, at Kirtland, Ohio, on the 10th day of January, 1847; that the said Mary Ann is still living, and that consequently the plaintiff is not his wife. This Mary Ann appears to be Young's first wife; and it is obvious that if the allegations of his answer are true, her rights are the only rights which the law can recognize. It will be seen by analyzing the answer that the defendant (1) denies any marriage with the plaintiff; (2) admits entering into what was known as a plural or "celestial" marriage, according to the usages of the Mormon church; and (3) sets up a previous, valid and still subsisting marriage. It is obvious that if either the first or the last of these propositions be true, the defendant is not entitled to a divorce, since there has been no marriage; and not being entitled to a divorce, she is not entitled to permanent alimony.

What, then, is the duty of the judge, on an application for alimony *pendente lite*, in a divorce suit, where the fact of marriage is controverted?

On proof of marriage the allowance of *ad interim* alimony is made almost as matter of course. Methvin v. Methvin, 15 Ga. 99; 2 Burn Ec. Law, 433, 436. And nearly all the cases proceed upon the ground that a marriage has been proved or admitted. Mix v. Mix, 1 Johns. Ch. 108; Methvin v. Methvin, 15 Ga. 99; Jones v. Jones, 2 Barb. Ch. 146. And ordinarily the judge will not hear proof as to the main issue, on such a provisional application. 2 Bish. Mar. & Div., § 406; Wright v. Wright, 1 Edw. Ch. 62; Jones v. Jones, 2 Barb. Ch. 146; Hammond v. Hammond, Clarke 151; Methvin v. Methvin, 15 Ga. 97; Daiger v. Daiger, 2 Md. Ch. 335; Coles v. Coles, 2 Md. Ch. 341.

In Bird v. Bird, 1 Lee, 209; 5 Eng. Ec. 366 (Arches' Court of Canterbury, 1753), a husband sued to have a marriage declared a nullity, on the ground that the wife had a previous husband living. Sir George Lee granted alimony pending the suit and money to defend; in doing which he observed: "The man by his suit admitted that he was married to her *de facto;* and it was alleged, and not denied, that he had lived with her as his wife for many years, and had eight children by her; and under that marriage he had a right, *jure mariti*, to possess himself of whatever she had, and must be supposed to have done so, and consequently she could have no money of her own to defend herself against his suit. I must presume, till the contrary appears in evidence, that she was his wife *de jure*, as well as *de facto;* for otherwise she must be guilty of bigamy, and is a felon; but the law presumes, on the contrary, everybody to be innocent until they are proved guilty." This precise question arose in this country in North v. North, 1 Barb. Ch. 241, where a bill to annul a marriage was filed by a husband, on the alleged ground that the defendant had a former husband living at the time of his marriage with her. The defendant having denied this fact by affidavit, Chancellor Walworth made a decree for the payment of *ad interim* alimony and money to defray the expenses of the suit. The learned chancellor seemed to rest the question, as did Sir George Lee, on the presumption which obtains in favor of innocence. "The affidavit of the defendant," said he, "denies the fact charged in the bill, that her former husband was living at the time of her intermarriage with the complainant. For the purposes of this application, therefore, the fact of marriage is admitted; and the presumption is that it was legal, until the contrary shall have been established by the proofs in the cause." Further on he lays down the rule applicable to cases where a husband files a bill against his reputed wife, admitting that he was in fact married to the defendant, but alleging that the marriage was illegal or void. "In such cases," said he, "if the facts stated in the complainant's bill, upon which the supposed illegality or invalidity of the marriage depends, are denied by the defendant upon oath, either positively or upon her information and belief, she is entitled to *ad interim* alimony for her support, until the truth or falsehood of the complainant's bill can be ascertained by proofs; and also to a reasonable allowance out of his property to enable her to make a proper defence to the suit."

In Smith v. Smith, 1 Edwards Ch. 155, the complainant applied for temporary alimony and money to carry on the suit, and the defendant, in opposition thereto, read a sworn plea which unequivocally denied the alleged marriage. It was, however, unaccompanied with any answer. Vice Chancellor McCoun granted temporary alimony, on the ground that although the defendant denied a marriage *de facto*, he had not denied cohabitation, or living together, nor the great cruelty set forth in the bill.

"The incidental power to make this allowance," says Starnes, J., in Methvin v. Methvin, 15 Ga. 99, "arises from the fact that the wife by her coverture, should not be placed in a position by which she has a right, without the ability to enforce and secure a remedy for its violation."

But more recently two courts of high character have laid down the rule that "alimony is a right that results from the marital relation, and that the fact of marriage must be admitted or proved before there can be a decree for it, even *pendente lite*." York v. York, 34 Iowa, 530; Brinkley v. Brinkley, 50 N. Y. 184. In this last case, which has attained considerable celebrity from the wealth and standing of the defendant, the court (by Folger, J.) say, after reviewing several authorities, that the principle at the bottom of the question is this: "Where marriage *in fact* being denied, the affirmative is upon the party claiming to be the wife to show

that an actual marital relation ever existed,—there alimony will be denied until the fact is proven to the satisfaction of the court, or is admitted; *for it is upon the existence of that relation that the right to alimony depends.* Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact,—there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied." And further on the learned judge says: "In an application for temporary alimony and the expenses of the action, though there may be in the answer a general denial of the existence at any time of the marital relation, the court has the power, from the affidavits and other papers presented to it, to pass upon the question for the purposes of the application, *and is not bound down to the allegations of the complaint and denial of the answer* submitted to it. And though the denial of the answer, if standing alone, would bring the case within the rule that where no marital relation is admitted or proven, there is no right to alimony; yet if the matters contained in the other papers, or shown by legitimate proofs before the court, make out, in the judgment of the court, a fair presumption of a fact of marriage, it has the power to grant alimony pending the action, and the expenses of the action."

But in the case, which we elsewhere print, there is no "fair presumption" that a marriage in fact exists. On the contrary the case presents this peculiarity: The status of the plaintiff is a matter of public notoriety and historical knowledge. Not only the learned judge himself, but every well-informed person in the United States knows that she is not, and never has been the wife of Brigham Young, but that her status is, in contemplation of law, no higher than that of a kept mistress of a man who has a lawful wife living. She does not even occupy the meritorious position of a woman who has been deceived into a supposed marriage with a man who had a wife living, in which case she would, according to the doctrine of some courts, be entitled to permanent alimony. Vanvalley v. Vanvalley, 19 Ohio St. 588. She has made her disgrace and crime a matter of notoriety by parading them before the public in a series of lectures delivered in most of the large cities throughout the Union. When these facts appear in proof, as they undoubtedly will, it is manifest, as Judge McKean himself indicates, that she must go out of court. But although the award of provisional alimony is to a great extent a matter of *discretion*, yet this discretion is a *legal* one, and the judge can not, in exercising it, proceed upon his own knowledge, or on public notoriety.

But it should seem that he ought not to plant himself upon a technicality and stop his ears against such proofs as may be offered touching the merits of the application. The defendant admits a *de facto* marriage; but he sets up new matter going to show that it was not *de jure*. The burden is upon him to make this new matter good; and if he offers proof for that purpose, it should seem that he ought to be heard, even on this preliminary application. If the plaintiff needs money to pay the expenses of the rebutting evidence she may wish to adduce, he should be compelled to furnish it. If, in resisting this provisional application, the defendant declines to adduce proof in support of the facts alleged in his answer, it should seem that the court ought not to hesitate to award the provisional relief prayed for. Chancellor Walworth laid down a sound maxim, in Jones v. Jones, 2 Barb. Ch. 146, when he said that such an allowance ought not to be made in a suit by a wife for a divorce, *where there is no probability that the plaintiff will succeed.* And we know of no principle which requires the judge, in a case of this character, to hear such an application *without evidence*, especially where such a course leads him to a conclusion which his own knowledge must tell him is an abuse of public justice. No doubt the single affidavit of the plaintiff would have settled the whole question, unless she is prepared to commit perjury like a dicer.

Railway Negligence — Constitution of Missouri Damage Act.

PHŒBE CONNOR v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.

Supreme Court of Missouri, February Term, 1875.

Hon. DAVID WAGNER,
" W. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

1. **Railroad Company—Liability for Damages—Killing Employee—Negligence of Company—Unskillful Servants.**—The representatives of one who is killed by an accident, while running, conducting or managing a train of cars or locomotive, can not recover in an action against the company, unless the company were guilty of negligence in employing another servant through whose unskillfulness in running, conducting or managing the train, the accident happens.

2. **Construction of § 2 of "Act for the better Security of Life and Property," Wag. Stat. 519.**—Statutes to be construed by looking mainly at the intent o the law, the defect or grievance proposed to be remedied, and the means provided to effect such remedy. In interpreting statutes the intent may often be reached by disregarding or transposing words. The intent must be carried out, though it requires the rejection of a liberal interpretation, or a restricted meaning is given to words. Contiguous sections may be referred to. A leading maxim is to reject an interpretation which conflicts with the views of the legislature, apparent in the enactment, and tends to such consequences as it would be disrespectful to the legislature to suppose were designed. [Per Napton, J.]

3. **The Construction in the Case of Schultz v. Pacific R. R., 36 Mo. 13, Reviewed and Disapproved.**—It was not the intention of the legislature to establish new rules of liability, but to extend their benefit to representatives of persons who die from their injuries. This intention is expressed in the third section of the same act. The omission of the word "person" in the 2d clause of the § 2 was accidental, and not intended to destroy the rights of employers under the first clause. The omission was an error of the draughtsman. The legislature could have had no motive for granting a right of action to representatives of a person who dies from the result of injuries received, and withholding the right from the person himself in case he survives and is permanently injured so as to render him helpless and a burthen to his friends. [Per Napton, J.]

Mr. Justice NAPTON delivered the opinion of the court.

This action was brought by the widow of Michael Connor, to recover the statutory penalty of $5000 damages for the death of her husband, caused by the negligence and unskillfulness of the officers, servants, agents and employees of the defendant.

The defence was that the plaintiff's husband was a brakesman at the time of the accident, and that the collision which overturned the cars, was not the result of any negligence.

The testimony of the plaintiff on the trial tended to show the following state of facts:

The gravel-train of the defendant, which was in charge of the plaintiff's husband as head brakesman, was backing up a switch, to allow a regular train to pass, and while running round a curve, ran over a cow, precipitating several of the flat-cars down an embank-

ment. Connor was on the car farthest from the locomotive, or on the front car as the train was running, and was killed. There was proof to show that the train was going at the rate of 25 or 30 miles an hour, though the engineer, or temporary engineer, stated that there was no steam on, and it was running on a descending grade, at about 5 or 6 miles an hour. There was also proof that the engine was at the time in charge of a fireman, the engineer being in the caboose adjoining, and that he was incompetent and had been subsequently discharged for incompetency.

On motion of the plaintiff's counsel, the court instructed the jury as follows: "1. If the jury believe, from the evidence, that the injuries from which Michael Connor died, were received without fault or negligence on his part; and that the injuries from which he died resulted from, or were occasioned by the negligence of employees of the defendant, while running, conducting or managing the locomotive or train of cars on which said Connor was at the time of receiving said injury, then they will find for plaintiff. 2. Negligence, as used in the foregoing instructions, consists in the doing of some act, with reference to the running, managing or conducting of said locomotive or train of cars by the officers, agents, servants or employees of defendant, which a reasonable, prudent man would not do, or in the omission by them to do some act with respect thereto, which a reasonable prudent man would not omit to do."

On behalf of the defendant, the court instructed the jury as follows:

"1. It is admitted by the pleadings, that, at the time of his death, Michael Connor was an employee of the defendants, and acting in the capacity of brakeman; hence,

"2. Unless the jury find from the evidence that Michael Connor died from an injury or injuries resulting from, or occasioned by the negligence or unskillfulness of some officer, agent, servant or employee of defendants, whilst running, conducting or managing a locomotive, car, or train of cars of defendants, then they ought to find for defendants.

"3. Even if the jury should find that at the moment of the injury, the engine driving the train on which Michael Connor was killed, was being managed and conducted by an employee of defendants who was not a skillful engineer, still the jury ought not to find for plaintiffs on that account, unless they further find from the evidence that Michael Connor died from an injury or injuries resulting from or occasioned by the unskillfulness of such employee.

"7. In this cause, the presumption of law is, that the employees of defendants performed their duties skillfully and carefully; and the plaintiff can not recover unless it is proved affirmatively that the death of Connor resulted from, or was occasioned by negligence or unskillfulness on the part of some officer, servant or employee, who at the time was running, conducting or managing the locomotive or train of cars on which the injury occurred."

The following instructions asked by the defendants were refused by the court:

"4. From the simple fact of an accident and injury resulting in the death of Michael Connor, no presumption of negligence or unskillfulness can arise. On the contrary, the presumption would be that the accident resulted from misadventure or inevitable fate, or other cause, for which the defendants would not be liable. Hence, in this case, the plaintiff can not recover in the absence of affirmative and positive proof that Michael Connor died from an injury or injuries resulting from, or occasioned by the negligence or unskillfulness of the officer, agent, servant or employee of the defendant, who was at the time of the injury, running, conducting or managing the locomotive or train of cars of defendant.

"5. If the jury believe from the evidence, that Michael Connor, as head brakesman, had the charge and control and was running, conducting and managing the train of cars at the time of the accident and injury which resulted in his death, they will find for defendant.

"6. Plaintiff can not recover on account of any negligence or unskillfulness of the brakeman who was braking on the train, at the time of the injury, which resulted in the death of Connor."

There was a verdict and judgment for plaintiff.

From the pleadings, evidence and instructions in this case, it is clear that the case was tried on a construction of the 2nd section of the act concerning damages, given by this court in the case o Schultz v. Pacific R. R., 36 Mo. 13.

The section referred to is as follows: "Sec. 2. Whenever any person shall die from an injury, resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive or train of cars; or, of any master, pilot, engineer, agent or employee, whilst running, conducting or managing any steam boat or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad or any part thereof; or in any locomotive or car; or in any steamboat or the machinery thereof; or in any stage coach or other public conveyance; the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for or recovered, first, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defence to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

The next succeeding sections are as follows: "Sec. 3. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act neglect or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

"Sec. 4. All damages accruing under the last preceding section, shall be sued for and recovered by the same parties and in the same manner as provided in the second section of this chapter, and in every such action the jury may give such damages as they deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

As the construction given to this second section of the damage act, in Schultz v. Pacific R. R., *supra*, has never been before this court since the decision of that case, so far as I am aware, and as my convictions are very well settled that the critical analysis of that section by the learned judge who delivered the opinion of the court in that case, and the conclusions to which he arrived in such examination, are totally at variance with the true intent and meaning of the act, it is proper to explain my reasons for these convictions. In doing so I speak for myself only, and with the highest respect for the abilities and learning of the judges who have expressed a different opinion.

The cardinal rule in the construction of a statute, is to look

mainly at the intent of the law; the defect or grievance proposed to be remedied, and the means provided to effect such remedy. The common law axiom that "*actio personalis moritur cum persona*," was the mischief which the legislature wished to abolish; and at the same time to point out the survivors who should have the right of action. The distinction between the right of action in passengers and employees, and the cases in which the one or the other might maintain actions, was not in the mind of the legislature in framing this enactment. They were looking in a different direction, and the use of the term "person" in the first clause of the section, and the term "passenger" in the second, and of both "passenger or person" towards the conclusion, was simply a blunder of the draughtsman, who, disregarding all the rules of punctuation, and delighting apparently in obscure, complicated and tautological phraseology, seems suddenly, after half completing the section, to have dropped in the word "passenger," at the very place where it ought to have been omitted, and left it out at the very place where it should have been inserted, in order to have carried out the real design of the act. The word "person," if carried through the section would have answered, or the words "person or passenger" in all the clauses, would have created no confusion or doubt.

There was no intention of establishing any new rules of liability for damages to the party injured, when he was alive and entitled to his action; but simply to extend the benefit of that liability to certain members of the family of the injured person, when death resulted from the injury. Had any such design been entertained, it was a simple and easy task, to be accomplished in plain, clear and unmistakable language.

Those who are engaged in the interpretation of statutes or of wills, or of written instruments of any description, are fully apprised of the necessity which frequently arises of disregarding words or transposing them, in order to carry out the primary and leading design of the paper, whether it be an act of a legislative body, or the will, or deed or contract of a private person. *Qui haeret in litera haeret in cortice.*

The object of judicial tribunals is to carry out the intent; and if such intent can be clearly gathered from the whole instrument or act, it must be carried out, though to effect this a literal interpretation must be rejected, or a restricted meaning be given to the words or contiguous parts of the instrument or sections of the law on the same subject be referred to.

Now the 3rd section of this act is upon the same subject, and has in view the same general object, though in the second section, the remedy is confined to certain public institutions (if we may so call them), whether corporations or not, established to afford facilities to the traveling public; and the third is designed to furnish redress for injuries occasioned by individuals who are not engaged in business of this character. Hence a discrimination is made in regard to damages; in the former case fixing it definitely, in the latter, leaving it to juries according to the facts and circumstances of the case.

But the 3rd section clearly announces the object of the legislature, which was to give no new cause of action, to legislate into existence no new grounds of recovery, but to give to certain representatives of a dead man a right of action which did not before exist in such representatives, *where the man, if living, would have had one*, and in no other case.

Another leading maxim in the interpretation of statutes, is to reject an interpretation which conflicts with the views of the legislature apparent in the enactment, and tends to such consequences as it would be disrespectful to the legislature to suppose were designed. This is in truth a mere variation of the first principle named, which requires the intention to be carried out, though at a sacrifice of words.

The interpretation of the second section advanced in the Schultz case, enlarges the rights of employees under the first clause, and abolishes the distinction between them and passengers, but destroys their rights under the second clause, where passengers only are named, and where the employees of the company, under the law as it existed before the passage of the act, were conceded to have a right of action, and where passengers also clearly had always a right of action, apart from any legislative enactment. This seems strange in a law which is supposed and asserted to have had in view a change of the law as established in the case of McDermott v. Pac. R. R., 30 Mo. 115. Now in that case, and in and in all the cases that have followed (and they have been numerous), the right of an employee (as well as passenger) to recover for injuries occasioned by defective machinery, etc., is conceded. But adopting the literal interpretation of the second section, as given in the case of Schultz, as the word "passenger" alone is used in the second clause, this right of the employee is destroyed, so far as his representative is concerned in the event of his death. Was this the design of the legislature? Clearly not. Had the word "person," or the words "person or passenger" been used throughout from the beginning to the end of the section, the whole purpose of the act would have been evident and unambiguous.

But there are other difficulties in this interpretation which I am unable to reconcile with what is assumed to be the object of the legislature. An employee of a railroad company, who is crippled to any conceivable extent is not supplied with any remedy; but, if he is killed outright, his wife or children, or parents are entitled to $5,000. What motive could prompt a legislature to such discrimination? It looks like a premium for homicide. Why should they allow a man's wife or children $5,000, when the husband or father is killed, and refuse to allow him anything when deprived of arms or legs, or both, and a hopeless, helpless cripple, and a mere incumbrance on his family? In one case, the family are deprived of the services of the head; but in the other, in addition to this deprivation, they have the burthen and expense of maintaining for life a helpless, perhaps bed-ridden cripple. I am unable to see any reason for such discrimination, and therefore am unwilling to impute to the legislature any intention of making it.

The doctrine first advanced by this court in the McDermott case has been received and sanctioned in various decisions since, and especially in the case of Gibson R. R. v. Pac., 46 Mo. 163, in which Judge Wagner has collected all the English and American authorities, and declared it to be the settled law of this state. It had been asserted in the case of Rohback v. Pac. R. R., 43 Mo. 187, and is re-asserted in Harper v. Indianapolis and St. Louis R. R., 47 Mo. 569. If the legislature think it wise to abolish the distinction between passengers and employees, they will surely make no destinction in favor of the representative of the injured party, and against the party himself. If abolished as to one, it will be abolished as to both.

So far, in my judgment, they have left this branch of the law of negligence as they found it; and in the act concerning damages, had not in view the alteration of any responsibility of companies or individuals engaged in providing accommodation for public travel, but simply to extend a pre-existing responsibility to certain representatives of the injured party, in case of his death.

It was not designed to change the law of contributory negligence, any more than it was intended to abolish the distinction between passengers and employees.

The fifth instruction in this case should have been given, if modified so as to hold the company responsible, notwithstanding Connor was the conductor and manager of the train, if the company had been guilty of negligence in employing an unskillful engineer, or allowing such engineer to turn over the engine to a fireman, who was not qualified to manage it, and the damage resulted from the conduct of the engineer or fireman. There was evidence on this point.

In my opinion, however, the pleadings will have to be amended.

The judgment is reversed, and the case remanded.

WAGNER, J.—I concur in reversing the judgment on the last point discussed in the above opinion, but I do not wish to be un-

derstood as assenting to anything that goes to impair the authority of the case of Schultz v. Pacific Railroad, and in this, I am requested to say that Judges Vories and Sherwood agree with me.

NOTE.—1. That portion of the opinion in this case which disapproves the construction given, in Schultz v. Pacific R. R., to the second section of the Missouri damage act, discloses one of the chief obstacles to the administration of justice. Nothing seems to give courts so much trouble as the construction statutes. And yet the courts, as a rule, are friendly to legislation, and frequently take occasion to call attention to the existence of wrongs for which a statute can furnish the only adequate remedy. With sincere regret they acknowledge their inability to cure some of the defects in the law, and earnestly recommend further legislation as the proper corrective. The results of legislative attempts to render legal rights and liabilities more certain, are discouraging in the extreme. The obscurity by which the rules of the common law are surrounded, is greatly increased in case of the written law, which is supposed to render all things plain and certain. It is not a matter of surprise, then, that so able and experienced a jurist as Judge Napton, while laboriously delving in a mass of legislative verbiage in search of the intention of the legislature, should give expression to his impatience at the stolid ignorance manifested by those who have the making of our laws.

In addition to the stupidity and general incompetence of the majority of our legislators, the difficulties of construing statutes are increased by the fact that all our legislative enactments are made after the same absurd pattern. The language is so full of repetitions, that the "damnable iteration," sickens the ear and blunts the comprehension. The same solemn fooleries are paraded in all acts of the general assembly. Each noun substantive and important verb must be accompanied by all its synonyms, and the entire brood are mustered and paraded as frequently as the case will permit. A board of *revisers*, organized as a new co-ordinate branch of the state government, for the special purpose of rendering the bills into plain English, before submitting them for executive sanction, would be the most effective remedy we can imagine for this evil.

Well-draughted bills, however, are often mutilated by inconsiderate tinkering, when the question is open for discussion. Some ambitious Mr. Whatshisname, who sees the term drawing to a close, with a strong conviction that this is to be his last chance; who never yet has been able to secure a satisfactory recognition of his transcendent abilities, pops upon his feet at the conclusion of the argument, and offers some frivolous verbal amendment that destroys the harmony of the entire act. His amendment is impatiently accepted to choke him off, and Mr. W. goes home to his constituency, his bosom glowing with the proud consciousness of public duty well performed. Years after, when the brief glory of representing his county once in the general assembly has faded into a reminisence, and the stupid clod is rusting away in obscurity, or even after his aspiring soul has flown from its earthly tabernacle, and his public services and private virtues have been enbalmed in a lying obituary, the wise sages, whose heads have grown gray in the study of the law as a science, are puzzling their wits to find a reasonable interpretation for the act, marred by this noodle's interference.

From what we know of statutes and legislatures we are inclined to regard the doctrine of *respectful* construction announced in the opinion of Judge Napton, as somewhat dangerous if pushed to an extreme. It would so often result in a total subversion of the expressed legislative will, that that body would become to the government, what a fifth wheel would be to a wagon.

2. What the learned Judge contends for in opposition to the majority of the court, is that it was not intended by the casual omission of the word "person" in conection with the word "passenger," in the second clause of the second section of the act in question, to limit the right of action to the representatives of passengers. That the second section was not intended to create a new liability, nor to abolish discrimination between employees and passengers, but to extend to representatives of persons who receive injuries that result in death, the same right of action that such injured parties would themselves have, should they survive their injuries. His reasoning shows that the legislature could have no motive for extending the right of action to representatives in case of negligence by an employee, and withholding it in a case of defective machinery, as well as an absence of motive for granting a right of action to representatives, which is withheld from the injured party while living. The fact that there is no well-defined division of the section into separate clauses, and that the forfeiture is mentioned with "person" and "passengers," in connection, would lead to the inference that employees, under the denomination of *persons*, are entitled to the benefit of both clauses or neither. Either of these conclusions might be reached by overruling the Shultz case.

Judge Napton's opinion seems to take it for granted that the legislature had some knowledge of the pre-existing rights of the parties at common law. This was probably not true as matter of fact.

3. Some of our railroad lawyers, who desire to take cases brought under this section from the jury, have maintained that the word "person," was intended to apply to wayfarers and others who might be injured, and were neither passengers nor employes. But the word is too comprehensive in its signification, to receive such a restricted interpretation, unless warranted by the context. It is true, that under a statute in relation to railroad companies, in New York, is has been decided, in Ernst v. The H. R. R. R. Co. (35 N. Y. 9), that the word "persons," refers to passengers and wayfarers, and not to employes. In the case of Rohback v. Pacific R. R. (43 Mo. 187), under a similar statute (Gen. Stat. 1865 ch. 63), the same question was settled in the same manner, upon the ground that the statute was, from its language, intended for the protection of passengers and wayfarers, who were peculiarly exposed by the kind of neglinence) therein specially guarded against. But in the case of Schultz v. Pacific R. R., *supra*, the word "person," as it occurs in this section of the damage act, was applied to the case of an employee, and this view of its meaning is cited with approval in the later case of Rohback v. Pacific R. R. Co., *supra*.

4. The refusal of the fifth instruction in this case is the only error assigned upon which it is reversed, and if given, might have defeated the action below, unless the petition had been fortified by a timely amendment, so as to conform to the evidence.

5. The doctrine that a servant who has been injured by the misfeasance, negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, unless the servant, through whose negligence the injury occurred, is not possessed of ordinary skill and capacity in the business entrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master, is declared in the following cases:

McDermott v. Pacific R. R. Co., 30 Mo. 115; Rohback v. Pacific R. R. Co., 43 Mo. 187; Moss v. Pacific R. R., 49 Mo. 107; Priestly v. Fowler, 3, M. & W. 1; Farwell v. Boston & W. R., 4 Metc. 49; Tenant v. Webb, 37 Eng. C. L. R. 281; Gilmore v. The Eastern R. R., 10 Allen, 233. Exceptional cases are decided adversely to this doctrine in 20 Ohio, 45, and 3 Ohio St. 202;

6. That the employee is liable when the injury results from his negligence in using defective or imperfect machinery or appliances, is fully maintained in the following cases: Gibson v. Pacific R. R. Co., 46 Mo. 163; Snow v. Housatonic R. R. Co., 8 Allen, 441; Cozzen v. Taylor, 10 Gray 274; Seaver v. Boston & M. R. R., 14 Gray, 466; Patterson v. Wallace, 1 McQueen, 748; Marshall v. Stewart, 33 Eng. L. and Eq. 1; Bydue v. Stewart, 2 McQueen, 30; Dixon v. Rankin, 14 Court of Sess. Cas. 420; Roberts v. Smith *et al.*, 2 Hurl and Nor. 259; Wright v. N. Y. Cent. R. R. Co., 25 N. Y. 565; Bricker v. N. Y. C. & H. R. R. Co., 2 Lans. 506; Lanning v. N. Y. C. & H. R. R. Co. 49 N. Y. 521; Ryan v. Fowler, 24 N. Y. 410; Keegan v. West. R. R. Co., 4 Seld. 175; Hayden v. Smithfield Manufacturing Co., 29 Conn., 548; Fifield v. Northern R. R., 42 N H., 225; Noyes v. Smith, 28 Verm. 59; Mad River & Erie R. R. Co. v. Barber, 5 Ohio St. 541; McGatrick v. Wason, 4 Ohio St. 566; Hoffingale v. N. Y. C. & H. R. R. Co. 8 Alb. Law Journal, 350; Piper v. N. Y. C. & H. R. R. Co., 10 Alb. Law Journal, 394.

7. As to the liability for negligence in employing incompetent workmen, see Harper v. Ind. & St. L. R. R. Co. 47 Mo. 567; Moss v. Pacific R. R. Co., 49 Mo. 169; Ill. Cent. R. R. v. Jewell, 46 Ill. 99; Wright v. N. Y. Cent. R R. Co. 25 N. Y. 565; Warner v. The Erie R. R. Co. 39 N. Y. 471; Snow v. Housatonic R. R. Co., 8 Allen, 444; Noyes v. Smith, 28 Verm. 63; Hutchinson v. Railw. Co., 5 Wells. Hurl. & G 352.

8. As to right to recover damages in certain cases of death from negligence, at common law, see opinion of Dillon, J., in Sullivan v. U. P. R. R. Co. 1 CENT. L. J. 595; 11 Albany L. J. 10. W. P. W.

Mormon Divorces—Ad Interim Alimony.

ANN ELIZA YOUNG, BY HER NEXT FRIEND, v. BRIGHAM YOUNG.

Territory of Utah, Third District Court, February, 1875.

1. **Divorce—Polygamous Marriage—Plea of Previous Marriage.**—Wher the plaintiff alleges that a certain marriage took place in 1868, and the defendant denies it, "for," or because, as the latter alleges, a certain other marriage took place in 1863, such denial is bad in law, and the plaintiff's allegation is admitted.

2. ——. ——. **Onus of Proving Previous Marriage.**—Where the defendant expressly admits an alleged marriage, and sets up new matter in avoidance of its validity, his admission will be taken as true; but the *onus* of proving the new matter is on him.

3. **Pleading—Effect of Denial and Admission.**—Where the defendant both denies and admits an allegation of the plaintiff, it amounts in law to an admission thereof.

4. **Validity of Mormon Marriages.**—A marriage solemnized in Utah, either according to the forms of the "church" of which Brigham Young is the head, or according

to the forms of the common law, is a lawful and valid marriage, provided the parties to the contract are, at the time of entering into it, legally competent to intermarry.

5. **Pleading—Issue and Burden of Proof under U. S. Practice Act.**—Where a woman, married according to the forms of said "church," sues for divorce, and presents a complaint good in law, and the defendant, admitting the marriage and cohabitation, alleges that the plaintiff had another husband, and he, the defendant, had another wife living at the time of such marriage, there being no replication under the practice act of Utah, the law denies these allegations for the plaintiff, and the defendant must prove them.

6. **Polygamous Marriages—Divorce.**—If it shall be proved that a marriage sought to be dissolved, was, to the knowledge of the parties at the time of entering into it, a polygamous or bigamous marriage, this court will not grant a decree of divorce. But the court is not permitted to presume what the proofs will be.

7. **Jurisdiction to Grant Ad Interim Alimony.**—This court has authority, in a proper case, without any statute provision on the subject, to grant *ad interim* alimony and sustenance.

8. **Where Alimony will be Granted.**—Where a woman sues for divorce, making all necessary averments in her complaint, and the defendant admits the marriage and cohabitation, but seeks to avoid responsibility by confessing himself guilty of a heinous felony, a clear case is presented for the exercise of such authority to grant allimony and sustenance.

9. **Amount of Allowance.**—As a general rule, alimony is allowed out of the husband's income; usually one-fifth, sometimes one-fourth, and in extreme cases a still greater proportion of such income is allowed. The temporary alimony allowed in the present case is one twelfth of what the defendant admits his income to be, or one-eightieth of what the plaintiff alleges it to be; and is to commence from the filing of the complaint.

This is an action for divorce, and the plaintiff moves for alimony and sustenance *pendente lite*.

Tilford & Hagan and *John B. McBride*, for the motion; *Hempstead & Kirkpatrick, Williams, Young & Sheeks*, opposed.

McKEAN, C. J.—In her complaint the plaintiff alleges, among other things, that she was born at Nauvoo, in the state of Illinois; that she is now, and has been continuously since the year 1848, a resident of Salt Lake county, in this territory; that on the 6th day of April, 1868, she and the defendant, Brigham Young, intermarried at that county; that ever since then she has been, and is now, the wife of the defendant; that at the time of said marriage she was in the twenty-fifth year of her age, and the mother of two children, the issue of a former marriage; that those children were aged, one four years and the other two years; that neither she nor her children had any estate nor patrimony whatever, and that they were entirely dependent upon her for their nurture and education; with all of which facts the defendant was well acquainted, and of which he had been informed prior to the said marriage; that said children, both of whom are boys, are still living, and from the time of her marriage to the defendant, have been continuously, and are now, under her custody, and with no means of support except such as she can provide; that for a period of about one year after his marriage, the defendant lived, and cohabited with, and acted toward the plaintiff with some degree of kindness and attention, and during that time contributed to her maintenance and the support of her two little children, not, however, in a manner proportionate to his means or to her station in life; that during all the period mentioned, and ever since then she has discharged with fidelity all the duties and obligations incumbent on her as a married woman, and uniformly treated the defendant with the utmost tenderness, ever mindful of her responsibilities as a wife; that about a year after his said marriage, for some cause or motive unknown to the plaintiff, the defendant, regardless of all his marital obligations, commenced towards her a systematic course of neglect, unkindness, cruel and inhuman treatment, ending in an absolute desertion of her, and forcing upon her the conviction that the defendant no longer entertained for her the slightest feeling of affection or respect, and had altogether withdrawn from her his support and protection.

To sustain these allegations, the plaintiff states, in detail, many facts and circumstances, among others, that the defendant has failed and refused to furnish her with necessary food and medical attendance, or the means to obtain them, and prays that by the final decree of this court, the defendant be ordered and decreed to support the plaintiff and her children, and that the bonds of matrimony between the plaintiff and the defendant be forever dissolved; and that during the pendency of this action the defendant be ordered and required to pay alimony to the plaintiff, for the maintenance and support of herself and children, and sustenance to her solicitors and counsel, etc.

This complaint, which is verified, contains all necessary averments, and sets forth a complete cause of action under the statute of Utah. Were its allegations all admitted, the plaintiff would be entitled to the relief prayed for as a matter of course. But the defendant has interposed an answer, under oath, admitting some and denying some of those allegations.

The defendant first qualifiedly denies, and then qualifiedly admits, the marriage of April 6th, 1868. His denial is as follows:

"Now comes the said defendant, Brigham Young, and for answer to the bill of complaint of said Ann Eliza Young, plaintiff, denies that on the sixth day of April, 1868, at the county of Salt Lake, Utah territory, or at any other time or place, this defendant and the said plaintiff intermarried, or that since that time, or at any time, the said plaintiff has been or that she now is, the wife of this defendant; for this defendant, on information and belief, alleges that before that time, to-wit: On the tenth day of April, 1863, at Salt Lake city, Utah territory, the said plaintiff was married to one James L. Dee, who is still living, and that ever since the said tenth day of April, 1863, the said plaintiff has been, and, on the said sixth day of April, 1868, was, and still is, the lawful wife of the said James L. Dee, never, as this defendant is now advised and believes, having been divorced from the said James L. Dee. But this defendant further says, that on the sixth day of April, 1868, and at the time of the ceremony hereinafter referred to, he was informed, and then verily believed that the plaintiff had, prior to that time, been legally divorced from the said James L. Dee."

The defendant's admission of the marriage is as follows:

"But the defendant says that he and the said complainant were, on the said sixth day of April, 1868, members of the Church of Jesus Christ of Latter-day Saints, and that it was a doctrine and belief of said church, that members thereof might rightfully enter into plural or celestial marriage. And the defendant admits that on the sixth day of April, 1868, at Salt Lake city, Utah territory, in accordance with and pursuant to the said doctrines, customs, and belief of the said church, a ceremony was performed to unite the plaintiff and defendant in what is known as such plural or celestial marriage." * * * "But the defendant denies that on the said sixth day of April, or at any other time, he and the said plaintiff intermarried in any other or different sense or manner than that above admitted and set forth."

It is an anomaly in pleading to deny that a certain marriage took place in 1868, "*for*," or because a certain other marriage took place in 1863. An argumentative denial, like this, is not good in law. The plaintiff's allegation, not being specifically denied, is admitted. Utah Practice Act, sec. 65. What does the subsequent express admission amount to?

"Where the admissions in an answer negative its general denials, the latter may be disregarded and judgment asked upon the former, when the complaint is verified, and the answer consists of such admissions and denials." Fremont *et al.* v. Seals *et al.*, 18 Cal. 433; Blood v. Light, 31 Cal. 115; Fish v. Redington, Id. 185. "A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next." "The object of sworn pleadings is to elicit the truth, and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading." Hensley v. Tartar, 14 Cal. 508. The defendant's qualified and defective denial of the marriage of April 6th, 1868, is inconsistent with his subsequent admission that the parties were intermarried on that day. Did the defendant mean to hint, what he did not like openly to say to the court, that a marriage cele-

brated by authority of the "church" of which he is the acknowledge head, is illegal, null and void? Let us enquire whether a marriage solemnized by such authority is necessarily void.

An Ordinance first enacted by the so-called State of Deseret, and afterwards re-enacted by the Territorial Legislative Assembly, entitled, "An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints," provides: "Sec. 3.—And be it further ordained that as said Church holds the constitutional and original right, in common with all civil and religious communities, to worship God according to the dictates of conscience; to reverence communion agreeably to the principles of truth, *and to solemnize marriage* compatible with the revelations of Jesus Christ, for the security and full emjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all, it is also declared that said church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass and establish rules, regulations, ordinances, laws, customs and criteions for the good order, safety, government, convenience, comfort and control of said church," etc.

It may be laid down as a sound legal proposition, that a marriage solemnized in Utah, either according to the forms of the "Church" of which Brigham Young is the head, or according to the forms of the common law, is a lawful and valid marriage, provided the parties to the contract are, at the time of entering into it, legally competent to intermarry.

But the defendant seeks to avoid the binding force of his admitted marriage to the plaintiff on the 6th day of April, 1868, by alleging, in effect, that neither of them was at that time competent to intermarry with any person. Not only does he allege that the plaintiff was then the wife of James L. Dee, but he further answers as follows:

"And the defendant further answering alleges, that at the town of Kirtland, in the state of Ohio, on the tenth day of January, 1834, this defendant, being then an unmarried man, was duly and lawfully married to Mary Ann Angell, by a minister of the gospel, who was then and there, by the laws of said state, authorized to solemnize marriages; and that the said marriage was then and there fully consummated; and that the said Mary Ann Angell, who is still living, then and there became, and ever since has been, and still is, the lawful wife of this defendant."

Thus does the defendant not only charge the plaintiff with, but confesses himself guilty of a felony. His admissions, so far as they prejudice himself only, will be taken as true; but his charges, so far as they tend to injure the plaintiff, must be proved or they will go for naught. The defendant must prove that the plaintiff was ths wife of another man, and that he was himself the husband of another woman on the 6th day of April, 1868, or his allegations to that effect can have no weight as against the plaintiff. There is no replication to an answer under the Practice Act of Utah, and these allegations of the defendant are denied for the plaintiff by operation of law. "Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall for the purpose of the action be taken as true. The allegation of new matter in the answer, shall, on the trial, be deemed controverted by the adverse party." Utah Practice Act. sec. 65. "The intention of the Code is to adopt the true and just rule that the defendant must either deny the facts as alleged, or confess and avoid them. When new matter exists it must be stated in the answer. New matter is that which under the rules of evidence, the defendant must affirmately establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter." Piercy v. Sabin, 10 Cal. 22. The allegations that the plaintiff had another husband, and the defendant another wife at the time of the marriage on the 6th day of April, 1868, are allegations of new matter, and this new matter the law denies for the plaintiff, and requires the defendant to prove.

It being admitted that the parties hereto intermarried at the time and place stated in the complaint, evidence is necessary to determine the following questions:

1. Was the plaintiff, on April 6th, 1868, the wife of James L. Dee?

2. Was the defendant, at Kirtland, in the State of Ohio, on the 10th day of January, 1834, lawfully married to Mary Ann Angell, and was the said Mary Ann his wife on April 6th, 1868.

If these questions shall be determined against the defendant, it will then become an important question whether the defendant has treated the plaintiff unkindly, cruelly, inhumanly, or has deserted or failed to support her; which, in his answer, the defendant denies. If, however, the first two questions, or either of them, shall be determined against the plaintiff; or, in other words, if it shall appear that the parties have knowingly entered into a polygamous or bigamous marriage, this court will not grant the divorce prayed for. But the court is not permitted to presume what the evidence will be. The witnesses necessary to maintain or to defeat this action are liable to be widely scattered in Utah, in Ohio, or elsewhere; and the litigation is liable to be protracted and expensive. Can the court lawfully require the defendant to pay an allowance for *ad interim* alimony and for the expenses of prosecuting the action?

The Utah statute is silent upon this question, but that silence does not answer it in the negative. "The allowance for *ad interim* alimony does not depend wholly upon the statute, but upon the practice of the court as it existed before the statute." North v. North, 1 Barb. Ch. R. 241. In Cast v. Cast, *ad interim* alimony was allowed by the unanimous decision of the Supreme Court of Utah.

"This question seems plain on principle. First, the authority to make the order belongs to the court under the law imported by our forefathers to this country; secondly, if this were not so, still it springs up necessarily out of the legal relation of the parties, and the condition of facts appearing of record before the court to which the application is made. And if any one principle of our jurisprudence is more worthy of commendation than another, it is, that the tribunals may always be pressed to action whenever the case comes within an established legal rule, though not within any precedent." 2 Bishop on Marriage and Divorce, sec 396. Chancellor Kent says: "I am entirely convinced from my own judicial experience, that such a discretion is properly confided to the courts." 2 Kent Com. 99, note. "The power to decree alimony falls within the general powers of a court of equity, and exists independently of statutory authority." Galland v. Galland, 38 Cal. 265.

Is the case at bar, as it now stands in court, a proper case for the exercise of this authority?

Bishop supposes the case of a woman marrying a man and afterwards finding that he "has already another wife living, and so the marriage is void. She may indeed treat it as void without a judicial sentence; yet suppose that, instead of this, she brings her suit against the man to have it decreed null. Her property is practically in his hands, though in point of law she retains the title. But since she has elected to let the court settle the question of nullity in a direct proceeding for this purpose, she has the same claim upon the court to have appropriated to her so much of this property as her necessities demand while the suit is going on, as though she alleged the marriage to be valid, and sought its dissolution for a cause occurring subsequently to the nuptials. In like manner, where the man seeks to establish the nullity of his marriage on the allegation that the woman has a former husband living, she may have alimony, pending the suit, and money to defend." 2 Bishop on Mar. and Div. sec. 402. "And this is so, even though it is alleged that the marriage was brought about by the fraudulent practices of the supposed wife, and though the costs of the suit may ultimately be awarded against her." Id., note 2.

In a case in New York, in which the supposed wife alleged marriage and cohabitation, the supposed husband denies the marriage,

but did not deny the cohabitation, and thereupon Vice-Chancellor McCoun made the allowance of temporary alimony, and money to carry on the suit. Id. sec. 404. In the case at bar the defendant both admits the marriage and fails to deny the cohabitation.

"Where upon an application for temporary alimony and an allowance for expenses, the facts undisputed are such as that from them a presumption arises that the parties were married, so that the affirmative rests upon the defendant to repel that presumption, the court has jurisdiction and power to grant the application, although marriage, in fact, is denied." Brinkley v. Brinkley, 50 New York, 184.

"The *ad interim* alimony and money to sustain the expenses are given, not as of strict right in the wife, but of sound discretion in the court. Yet the discretion is a judicial, not an arbitrary one. And when a case is brought within the principles recognized as entitling the wife to the allowance, the allowance follows pretty much as of course, without enquiry into the merits of the case. If, for example, she is plaintiff, it is no objection that the husband denies her charges under oath." 2 Bishop on Marriage and Divorce, sec. 406.

Owing to the peculiar notoriety of the parties, and to the importance of this case in the jurisprudence of Utah, it has been deemed desirable to show, even at the risk of being elementary, that this case comes clearly within the principles universally recognized as giving a woman who is a party to a suit for divorce, a just claim for alimony and sustenance; "the one being for the defraying of the ordinary expenses of the wife in the matter of living; the other being for the same purpose in respect to the matter of the suit." Id. sec. 387.

It now becomes important to inquire what principles must guide the court in fixing the amount of the allowance in this case.

"As a general proposition, the fund out of which the wife is entitled to her alimony is the *income* of the husband, from whatever source derived or derivable." Id. sec. 447.

"The ordinary rule of temporary alimony is to allow the wife about one fifth of the joint income. * * * This is regarded as a fair medium, though the proportion will vary * * * according to circumstances. When the necessities and claims of the wife have been large, one-fourth has been allotted; and Sir John Nickoll, in one case * * granted the wife £50 per year out of an income of £140. * * On the other hand, in different and peculiar circumstances, the wife has been obliged to accept as small a proportion as one-eighth." Id. sec. 460. "Alimony *pendente lite* is usually made, by the terms of the order itself, to commence from the return of the citation. This is the true rule. * * * But it may be made to commence earlier or later." Id. sec. 424; Burr v. Burr, 7 Hill, 207.

The plaintiff alleges in her complaint "that the defendant was at the time of her said marriage, ever since then has been, and is yet, the owner in his own right, of vast wealth, amounting to several millions of dollars, and is in the monthly receipt of an income therefrom of not less than forty thousand dollars; and she prays for an *ad interim* allowance of one thousand dollars per month.

On the other hand, the defendant "denies that he is or has been the owner of wealth amounting to several millions of dollars, or that he is or has been in the monthly receipt from his property of forty thousand dollars or more. On the contrary the defendant alleges, that according to his best knowledge, information and belief, all his property taken together, does not exceed in value the sum of six hundred thousand dollars, and that his gross income from all of his property, and every source, does not exceed six thousand dollars per month.

"And the defendant denies that one thousand dollars, or any other sum exceeding one hundred dollars per month, would be a reasonable allowance to the plaintiff, even if defendant was under any legal obligation to provide for the maintenance, education and proper medical attendance of said plaintiff and her children during this litigation."

Under all the circumstances of this case, it seems just that the defendant should pay to the plaintiff, to defray the expenses of prosecuting this action, the sum of three thousand dollars; and that he should pay to her, for her maintenance, and for the maintenance and education of her children, the further sum of five hundred dollars per month, to commence from the day of the filing of the complaint herein.

It is ordered accordingly.

Fire Insurance — Parol Contract — Authority of Agent—Remedy.

THE FRANKLIN FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR, v. SAMUEL C. COLT.

Supreme Court of the United States, No. 93,—October Term, 1874.

1. **Fire Insurance—Parol Contract—Corporate Powers.**—An incorporated company may make a valid parol contract of insurance, notwithstanding its charter provides that "every contract, bargain, agreement and policy" for insurance shall be in writing, and be signed and attested by its officers.

2. ——. ——. **Authority of Agent.**—The insurer's agent may, after loss, fill up and deliver a policy, in pursuance, and as evidence of a contract previously made by parol.

3. ——. ——. **Policy—Remedy at Law.**—The policy when so filled up becomes at once the property of the assured, and an action may be maintained at law upon it, without manual possession.

In error to the Circuit Court of the United States, for the District of Connecticut.

Mr. Justice FIELD delivered the opinion of the court.

The charter of the company defendant, in the same clause which authorizes its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies, and other instruments" as may be necessary, declares that every such contract, bargain, agreement and policy shall be in writing, or in print, and be under the seal of the corporation and be signed by the president and attested by the secretary or other officer appointed for that purpose.

Where similar language as to the form of the contract, or policy, was used in connection with a like grant of power to insure, in a general statute of Pennsylvania, respecting insurance companies, it was held by the late Mr. Justice Grier, in a case before the Circuit Court of the United States, that a company to which the law applied, could make an insurance, which would be legally valid, only by a policy attested by the officers and seal of the corporation.* The learned justice undoubtedly considered that the mode in which the contract or policy could be made was so associated with the grant of power as to be essential to a valid exercise of the power. And such appears to be the natural import of the language of the clause of the charter of the defendant under consideration in this case, when the whole clause—that which confers the power and that which prescribes the mode of its exercise—is read.

But the learned justice at the same time very justly observed, that before the policy was attested in due form, the president or secretary, or whoever else might act as general agent of the company, might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract specifically; and that where a loss had happened, to avoid circuity of action, the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy properly attested.

The requirement of the charter in this case has reference, in our judgment, only to executed contracts or policies of insurance, by which the company is legally bound to indemnify against loss, and not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company. The preliminary arrangements for the amount and

conditions of insurance are in a great majority of instances made by agents. It is always so where the insurance is effected out of the state where the company is incorporated and has its principal place of business. The charter of the company in this case authorized the president and directors to appoint officers and agents for conducting its business in other places than the city of Philadelphia. And it would be impracticable to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.

In a recent case in the Court of Appeals of Kentucky, this precise question was considered, and its determination was in accordance with the views we have expressed.* There the suit was to enforce a parol contract of insurance made by the agent of the company, whose charter provided that all policies or contracts of insurance made by the corporation should be "subscribed by the president, or president *pro tem.*, and signed and attested by the secretary, and being so signed and attested," should be binding and obligatory upon the corporation without its seal, according to the tenor, extent, and meaning of the policies or contracts. And the court held that this clause did not require an executory contract for an insurance to be in writing, and said, that it knew of no American charter which did so require, observing that whilst a policy as an executed contract of insurance was defined to be documentary and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no statute of frauds applied, and that the common law did not require writing.

There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides, with full knowledge by the agent of the condition, character, and value of the property insured. The credit allowed for the payment of the premium was an indulgence which the agent was authorized by general usage to give. Its allowance did not impair the preliminary contract; that being valid could have been enforced in a court of equity against the company; and having been enforced by the procurement of a policy, an action could have been maintained upon the instrument; or the court in enforcing the execution of the contract might have entered a decree for the amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the action of the agent in filling up the blank policy, which was duly attested, as he should have done immediately after the preliminary arrangement with the assured. *The agent was authorized to do after the fire, that which he had previously stipulated to do on behalf of the company.* The original neglect to fill up the blank policy, at once constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agent. The filling up of the policy was a voluntary specific performance of the preliminary agreement. And, when filled up, the policy was by express stipulation to be held by the agent in his safe for the assured, and no actual manual transfer was, under these circumstances, essential to perfect the latter's title. It then became his property, and upon a refusal of the defendant to surrender it, two courses were open to him; either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.

In Kohne v. The Insurance Company † the terms of insurance upon a vessel were agreed upon between the agent of the plaintiff and the company. For the premium a note was to be received with approved security. A policy was accordingly filled up by the president, in comformity with the agreement, and notice thereof given to the agent. Three days afterwards the agent called at the office of the company to deliver the note and receive the policy. The company had in the meantime heard of the loss of the property insured, a fact which was unknown to either party when the agreement was made, and refused to deliver the policy, asserting that the agreement for the insurance was inchoate, which it had a right to retract. The assured then brought trover for the policy, and Mr. Justice Washington, presiding in the circuit court, sustained the action, holding that the contract was perfected when the policy was executed, and, of course, that the possession of the instrument by the company, after giving notice of its execution, did not impair the title of the assured.‡

In Lightbody v. The North American Insurance Company,‖ the agent of the plaintiff made a contract of insurance of certain buildings with the agent of the defendant on the 30th of March, and paid the required premium. On the following morning the buildings were destroyed by fire. The policy was made out and delivered by the agent on the 21st of April following, after the company had refused to pay the loss; and the court held that the policy took effect by relation from the day of its date, which was the day the premium was paid and the contract concluded; that it was the manifest intent of the parties that the contract should operate from its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had been then delivered; that the agent pursued his authority in delivering the policy after the loss, and that the delivery bound the defendants.

In the case of The City of Davenport v. The Peoria Marine and Fire Insurance Company§ the power of an agent to issue a policy after a loss, pursuant to his agreement, was very fully and ably considered with reference to the principal decisions on the subject. There the agreement for insurance was made between the parties by their agents on the 20th of March; on the night of the same day the property was destroyed by fire; on the following morning the policy was executed and delivered in accordance with the agreement, both parties at the time being ignorant of the loss. The court held that the policy was valid and binding; that the doctrine that an act done at one time may take effect as of a prior time, by relation back, was applicable to contracts of insurance; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, took effect by relation as of that date.

Numerous other authorities to the same purpose were cited on the argument, but we do not deem it necessary to pursue the subject further. We see no error in the ruling of the court below, and its judgment must, therefore, be affirmed; and it is so ordered.

NOTE.—The statement of facts made by the learned justice in this case is not very full, and many of the apparent facts are stated argumentatively. It was probably expected of the industrious reporter, Mr. Wallace, that he would supply a full report of the facts, according to his usual practice. If we might criticise the form of the opinion in this respect, it would be by expressing regret that in a case of so great importance as this, and possessing so many of the elements of a leading case, the facts are not so fully stated as to give to the opinion a rounded completeness, and make unnecessary a resort to extraneous statements.

*Constant v. The Insurance Co., 3 Wallace, C. C. 316.

*The Security Fire Insurance Company of N. Y. v. The Kentucky Marine and Fire Insurance Company, 7 Bush, 81.

†Washington's C. C. Rep., vol. 1, 93.

‡See also Sheldon v. Conn. Mutual Ins. Co., 25 Conn., 207.

‖23 Wendell, 18.

§17 Iowa, 277.

1. In the following named cases the charter of the insurance company provided that *all policies* should be in writing, and it was held that a valid contract might be made without any policy: Post v. Ætna Ins. Co., 43 Barb. 351; Walker v. Metropolitan I. Co., 56 Me. 371; N. E. Ins. Co. v. DeWolf, 8 Pick. 56; Bapt. Ch. v. Brooklyn I. Co., 19 N. Y. 305. In the last-named case the reasons for the decision are amplified by Comstock, J., who holds the main object of such provisions of the charter to be the regulation of the manner in which the officers of the corporation shall discharge their duties, and not a restriction upon the corporate powers. In Henning v. U. S. Ins. Co., 47 Mo. 425, and Mutual Ins. Co. v. McGillevray, 9 Lower Can. R. 488, the same question arising, it was held that the mode of action pointed out in the charter was exclusive of all others. But when the Missouri case came before Judge Dillon of the 8th U. S. Circuit, he declined to follow the supreme court of that state, and decided in Henning v. U. S. Ins. Co., 2 Dillon, 26, in accordance with the law as now determined by the principal case.

It will be observed that the charter in this case applies to *every contract, bargain, agreement or policy* for insurance; in which respect it is far more stringent than most of the charters which have passed in review. In sustaining the power of the corporation to contract orally, notwithstanding this charter, the supreme court goes far beyond any of the state courts. It is interesting here to note how far this learned and progressive court has advanced from the position it occupied in 1804, when Marshall, C. J., held that an insurance company was "precisely what the incorporating act has made it, deriving all its powers from that act, and capable of exerting its faculties only in the manner which that act authorizes." Head v. Providence Ins. Co., 2 Cranch, 167.

2. The cases which hold that in general a contract of insurance does not depend on the actual delivery of the policy, will be found collected in Flander's on Fire Ins., pp. 116 and 130, and May on Ins., pp. 16–23.

In addition to the cases cited in the foregoing opinion, it has been held, and for reasons similar to those there given, that in the absence of fraud, the insured was liable where the policy was not delivered nor the premium paid until after the loss had occurred, in Bragdon v. Appleton Ins. Co., 42 Me. 259; Hallock v. Com. Ins. Co., 2 Dutcher (N. J.), 268; Com. Ins. Co. v. Hallock, 3 Dutch. 645, and Keim v. Home Ins. Co., 42 Mo. 38, which last case was since fully approved in Baldwin v. Chouteau Ins. Co., 3 Ins L. Jour. 369 (S. C. Mo., Mar. 23, 1874). A similar conclusion was reached in Ellis v. Albany City Co., 50 N. Y. 402, where the premium had been paid but the policy not delivered at the time of the loss. The same principle is recognized in Bapt. Ch. v. Brooklyn Ins. Co., 28 N. Y. 153. To these may be added the case of Merchants' Ins. Co. v. Patterson, decided by the Supreme Court of the United States, Jan. 7th, 1874 (not reported), in which the policy to run for 12 mos. from Jan. 1, 1869, was made and dated March 1, 1869, and a loss having occurred before the last named date, it was held that the neglect of the assured to report the loss, did not affect or avoid the policy. A different conclusion was reached in Marland v. Royal Ins. Co., 71 Penn. St. 393, where the policy at the time of loss was held by an insurance broker for the convenience of the assured, the premium not having been paid, and the insurer was held not liable.

3. On the question of remedy, the *dictum* that equity, having jurisdiction to compel by specific performance, the issuance and delivery of a policy, will, to avoid circuity of action, render judgment for the amount of the policy, is sustained by the cases of Perkins v. Washington Ins Co., 4 Cowen, 645; Carpenter v. Mut. Safe. Ins. Co., 4 Sandf. Ch. 408; Union M I. Co. v. Com. Ins. Co., 2 Curtis, 524; and there is a like *dictum* in 43 Barb. 363, *supra*. Like relief was granted in Palm v. Medina Co. Ins. Co., 20 Ohio, 529, the Ohio practice, however, blending law and equity in one form of action. The grant of relief in the principal case, on legal principles, is in accord with the cases in 2 Dutch. 268, 3 Dutch 645, 42 Mo. 259 and 43 Barb. 351, *supra*, in which an action at law was sustained without any delivery of the policy. The italicised sentence of the opinion is in accord with the cases in 42 Mo. 38, and 3 Ins. Law Jour. 369, *supra*, in which the procuring of the policy by the assured from the agent after the loss, without communicating the fact of loss, is sustained as a matter of right and not a fraud. All the cases rest upon the doctrine that the policy upon execution needs no delivery, but at once becomes a vital policy and the property of the assured, and if withheld, he may sue either in trover, assumpsit or case. This doctrine is elaborated in 2 Dutch. 278, and 3 Dutch. 647, *supra*, in language as clear as that used in the principal case; and is attributed to the text-writers Marshall, Duer and Angell, who have in turn deduced it from the early case of Harding v. Carter, decided in 1781, and reported in Park on Ins., p. 4, where, curiously enough, Lord Mansfield sustained an action of trover against *two insurance brokers*, for two policies that had never existed, save in the representations of the brokers and the confident belief of the plaintiff. J. O. P.

Correspondence.

WOMEN AS COUNSEL.

BOSTON, March 16, 1875.

EDITORS CENTRAL LAW JOURNAL:— If your correspondent, "N.," in your last issue, will turn to the fifth edition of Lord Raymond's Reports, ably edited by Charles James Gale, London, 1832, he will find something "to support the extraordinary statement in the case referred to." It is there printed "*Mrs.*," and not *Mr.* "Cheshyre, counsel with the plaintiff." But it is undoubtedly a typographical error. I did not so understand it, however, when I copied it. F. F. H.

Jurisdiction of United States Circuit Courts—Removal of Causes.

AN ACT TO DETERMINE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND TO REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS AND FOR OTHER PURPOSES.

Be ti enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereot he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills exchange. And the circui t courts shall also have appellate jurisdiction from the district courts u nder the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a civil nature at law or in equtiy, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit in the Circuit Court of the United States for the proper district.

SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the Circuit Cour of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged;

and the said copy being entered as aforesaid in said Circuit Court of the United States, and the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or valne being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SEC. 4. That when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal, shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC 5. That if, in any suit commenced in a circuit court, or removing from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or conrroversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just, but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme co urt on writ of error or appeal as the case may be.

SEC. 6. That the Circuit Court of the United States shall, in all suits removed under provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal.

SEC. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition, and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States, to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding $1,000, or both, in the discretion of the court. And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said state court, commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with its provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as oforesaid, shal be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district were such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less then once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state: *Provided, however*, that any defendant or defendants not actually personally notified as above provided, may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment, according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the supreme court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 3, 1875.

DEPARTMENT OF STATE,

A true copy: SEVELLON A. BROWN, Chief Clerk.

Some Recent Decisions in Bankruptcy.

PLEDGOR MAY RETAIN POSSESSION OF PLEDGED COLLATERALS FOR COLLECTION—WARRANT OF ATTORNEY TO CONFESS JUDGMENT.

James R. Clark, Jr., Assignee v. Iselin *et al.* Iselin *et al.* v. James R. Clark, Assignee—Cross Appeal. Nos. 102 and 103.

United States Supreme Court, October Term, 1874.

Opinion by STRONG, J.

The full text of this decision may be found in 7 Chicago Leg. News, and occupies more space than the points involved seem to require. The bankrupt firm borrowed from Adrian and Isaac Iselin, $61,000, taking as a collateral security, $72,170 42 of bills receivable—some of them past due; on the day

following, the notes held as collateral, were returned to the bankrupt, as the court says, "for convenience of collection, to be collected for account of the defendant's or to be replaced by others." and the court continues: "Obviously, this deposit in no degree affected the title of the defendants to the notes. It merely facilitated collections. In White v. Platt, 5 Denio, 269, it was said by the court that 'where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them. That property is not lost by their being redelivered to the pledgor, to enable him to collect them, the principal debt being still unpaid. Money which he may collect upon them is the specific property of the creditor. It is deemed collected by the debtor in a fiduciary capacity.'

If the foregoing is to be regarded as good law, viz: That a borrower of money can give title to choses in action as security, and still retain possession of them for "*convenience of collection*," or "*to be replaced by others*," how long will it be before we shall need some new sections to our statutes of frauds? What prevented the bankrupts in this case, on the day following the returns of the collateral, from borrowing from some other accommodating lender, another $61,000, on the same collateral; again taking the collateral "for convenience of collection," and so on, *ad infinitum*, until their necessities brought them to a lender, who should make it convenient to collect the collaterals himself? And would it then be so obvious that "this deposit in no degree affects the title of the defendants to the notes?" or that "it merely facilitated collections?" But, to return to the case. Only a part of the $61,000 was paid at maturity, the remainder renewed, and extended from time to time, and the collaterals were in part surrendered and in part replaced by others. On the 5th of April, 1869, all the collaterals were withdrawn, and others, amounting to $62,027-34, were pledged in their stead. On the 3rd of May, a petition in bankruptcy was filed against the debtors. The court held, citing Cook v. Tullis, 18 Wallace, 332, and Tiffany v. Boatman's Saving Institution, 18 Wall. 375, that this latter exchange of securities, though made within four moths next prior to the petition in bankruptcy, was not a fraud upon the bankrupt law. The court also held, under the circumstances of the case, that a payment to defendants, by the bankrupts of $7,944 88, made April 8, 1869, in the regular course of business, was not a preference, because the debtors were paying their other creditors as their claims matured; there was nothing in the transactions showing any intended preference, or that the debtors contemplated bankruptcy, though it is highly probable that they were in fact insolvent.

As to the cross appeal, the facts were briefly as follows: On the 25th of February, 1869, the bankrupts gave defendants a judgement-note or bill, under the New York code, to secure a loan of $54,100. This note was not of money, but of negotiable state and railroad bonds, upon which the bankrupts were to, and did borrow $46,000, from certain banks. This confession of judgment was held by the defendants, without entry of record, until April 30th, 1869, when judgment was entered upon it in the Supreme Court of New York, and an execution was issued and levied upon the debtor's stock of goods, greater in value than the amount of the debt. On the first of May, 1869, at the request of the debtors, defendants paid the banks, with which the bonds loaned had been pledged (N. B. These banks seem to bave found it convenient to retain possession of *their* collateral), the sums for which they were held, and took up the collateral notes. Then the debtors paid to defendants $1,900 in cash, and transferred bills receivable and accounts owned by them, amounting to $47,000, in full satisfaction of the balance of the judgment, and the levy of the execution was released.

The circuit court had held this transaction to be fraudulent, as in conflict with the bankrupt act, and decreed that the assignee should recover the amount realized by the defendants from the bills and accounts transferred in satisfaction of the judgment, also the $1,900; and the value of the securities redeemed from the banks, above the sums which they paid for the redemption.

The reasoning of the opinion, in reversing the decree of the circuit court upon this branch of the case, is as follows: The confession of judgment, given on the 25th of February, was a security for a loan then made, not a security for a pre existing debt, and, consequently, not a preference of creditors.

If the confession of judgment was not a preference, the subsequent entry of the judgment, issuing execution and levy on the debtor's goods, though the defendants then knew that the debtors were insolvent, did not constitute a preference, because—

I. (Quoting from the opinion) A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the bankrupt act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter. In Wilson v. The City Bank, 18 Wall. 473, it was decided by this court that when a debt is due, and the debtor is without just defence to the action, "something more than passive non-residence of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act, and that though the judgment-creditor in such a case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law." It was also decided that a "lien thus obtained by the creditor will not be displaced by subsequent proceedings in bankruptcy against the debtor, though obtained within four months from the filing of the petition." It is true that in Wilson v. The City Bank, the judgment under review and the execution thereon was obtained in an ordinary suit at law, to which the debtor made no defence, but allowed the judgment to be taken by default. In this case the judgment was entered by the creditor in virtue of what is called a confession previously made, equivalent to a warrant of attorney to confess a judgment. But it is impossible that can make any difference in its validity. The confession having been lawful when it was given, the subsequent use of it by the creditors according to its legal effect, a use to which the debtors were not parties, and of which they had no knowledge, can not be illegal."

II. To constitute preference within the act several things must concur (again quoting from the opinion):

1. The debtor must have procured the judgment and attachment of his property.

2. He must have procured them within four months next prior to the filing of the petition in bankruptcy, by or against him.

3. He must have been insolvent, or contemplating insolvency, at the time, and he must have procured the judgment and execution with a view to give a preference to the judgment-creditor.

4. The creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment and execution were given in fraud of the provisions of the bankrupt act. We say these things must concur. And they must concur not only in fact, but in time also. The words of the 35th section admit of no other construction. The debtor must be insolvent, or contemplating insolvency, *when* the alleged preference is given. And he must *then* have in view giving a preference. He must procure the attachment or the entry of the judgment, the execution, and the levy, with a present intention to prefer the creditor. The unlawful view to a preference must co-exist with the procurement. It is not enough that it precedes the entry of the judgment and the levy of the execution, or that it follows. And the creditor, *when* he obtains the judgment and execution, must have reasonable cause to believe not only the debtor is insolvent, but that the attachment is made (made or caused by the debtor) in fraud of the provisions of the act. In fine, there must be guilty collusion to constitute the fraudulent preference condemned by the statute.

* * * * * * * * *

If, then, the entry of the judgment, the execution and the levy on the 30th of April, 1869, were not a forbidden preference, as we have endeavored to show they were not, the transaction on the next day, May 1st, was unimpeachable. It was only an exchange of values. The debtors transferred to the execution creditors bills receivable and other securities, together with $1,900 in cash, the whole value being equal to the amount of the judgment, and received back the goods upon which the execution had been levied. Those goods were of greater value than the securities transferred and the money paid. It is not claimed that the defendants obtained more than they gave in return. The exchange, instead of impairing the debtors' estate, actually benefitted it. It saved the stock levied upon from the expense and sacrifice of a forced sale. It was, therefore, such an exchange as the debtors might lawfully make and as the creditors might lawfully accept. This is determined by Cook v. Tullis, *supra*, and Tiffany v. Boatman's Savings Institution, 18 Wallace, 375.

It follows that the decree of the circuit court affirming the decree of the district court must be reversed. All that the complainant in the district court is entitled to recover against the defendant is the sum of $2,286 27, being the sum mentioned in section eleven of the stipulation between the parties, dated September 1, 1871, if that sum has not been already paid.

The decree of the circuit court is wholly reversed, and the cause is remanded with instructions to proceed in accordance with this opinion.

It does not appear in the above opinion, what made up the sum of $2,286.27 which complainant was allowed to recover. If it was the $1,900 paid May 1st (with interest), why should not the transfer of cash stand in the same light, as the transfer of bills receivable and other securities?

D. T. Watson, Assignee of August Sweeney, Plaintiff, v. Isaac Taylor, } On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Pennsylvania.

Supreme Court of the United States. No. 121. October Term, 1874.

Mr. Justice STRONG delivered the opinion of the court.

"The proceedings in bankruptcy were commenced on the 15th of January,

1869. On the 4th of August, 1868, more than five months before the petition was filed, the bankrupt gave to the defendant his promissory note, containing a warrant to confess a judgment thereon. By virtue of the warrant a judgment was entered on the 1st day of January, 1869, and the execution, levy, and sale immediately followed. Were there nothing more in the case, what we have decided in Clark v. Iselin (opinion just read), would determine that no preference within the meaning of the bankrupt act was given. The case, however, shows affirmatively that no fraud or collusion was intended, either at the time when the note was given or when the judgment was entered, and that the creditor had no reason to believe that the debtor was insolvent.

"The first, second, and fourth questions are, therefore, answered in the negative, and, being thus answered, the other questions become immaterial."

Warrants to confess judgment, seem to be a favorite method of evading the provisions of the bankrupt act in Pennsylvania and New York, and a successful one, too."

RE-EXAMINATION OF CLAIM — PRACTICE.

In the matter of Ira A. Lount and C. W. Lount (U. S. D. C. N. D. Ill. Blodgett, J., January, 1875), 7 Chicago Leg. News, 155. This case decides: That if the creditor fails to appear and submit to the examination, as required by the notice given under rule 34, the register may expunge or diminish the claim by the default; that the citation throws upon the creditor the burden of supporting his claim by further proof than that already filed; that if a creditor is unable to attend, he should take steps to procure postponement. If the creditor does not appear, the register should consider the objections against the claim as admitted. E. T. A.

Notes and Queries.

I. ACTION ON COUPONS—APPEAL TO UNITED STATES SUPREME COURT—AN ANSWER.

EDITORS CENTRAL LAW JOURNAL:—In answer to question under above head-lines in your last issue: Where the sum claimed in the writ and declaration does not exceed $2,000, an appeal will not lie. Walker v. United States, 4 Wall. 163; Merrill v. Petty, 16 Wall. 338. If the legal existence of the bonds and coupons was a point in issue in the first action, the judgment there rendered would, in the second action between the same parties as a plea, be a bar, or, as evidence, conclusive on the point. Hopkins v. Lee, 6 Wheat. 109; Embury v. Conner, 3 Comstock, 552; Outram v. Moorwood, 3 East, 354; Greathead v. Bromley, 7 Term R. 456; Gardner v. Buckbee, 3 Cowen, 120.

H.

Will some of our readers oblige us by answering the following?

II. ACTION TO QUIET TITLE—ADVERSE POSSESSION.

DES MOINES, IOWA, March 15th, 1875.

EDITORS CENTRAL LAW JOURNAL:—As, so far as I have been able to ascertain, the question has never been directly decided in this state, I venture to ask whether a title to land acquired by adverse possession (such as would constitute a valid defence to an action of ejectment at common law) would be sufficient, under the laws of the state of Iowa, upon which to base an action to quiet title? SUBSCRIBER.

III. VENDOR AND VENDEE—UNLAWFUL POSSESSION — REMEDY.

FORT SMITH, ARKANSAS, March 22, 1875.

EDITORS CENTRAL LAW JOURNAL:—Will some of your correspondents answer the following:—A. enters into verbal agreement with B., to convey the latter a lot of land, on which is erected a mill, for $3,000, $1,000 in cash, and the balance in one and two years, in equal instalments. B. makes the cash payment and is put in possession. During the temporary absence of B., A. gets peaceable possession, and B. is thereby deprived of the only means of making the deferred payments. What is B.'s remedy? ENQUIRER.

IV. STATUTORY CURIOSITIES.

IOWA CITY, IOWA, March 22, 1875.

EDITORS CENTRAL LAW JOURNAL:—Speaking of "Statutory Curiosities," would you mind a few phenomena of that sort in the CODE of Iowa, 1873? where, beside those mentioned in the errata, the following *faux pas* can be found: Section 2736 allows no record to be amended *with* the order of the court. Section 3612 (4246 of the REVISION of 1860 having been omitted) declares the same punishment for a repetition of an offence, as for the first transgression of the sort.

Section 4431, using "submitted" for "dismissed," places the prisoner on trial upon the original indictment, even though in the meantime, an indictment for an offence of a higher nature has been duly found. Section 746 must command a prominent place in political ethics; for it, indeed, would remove a county or township officer for gross *impartiality*.

Yours, H.

Legal News and Notes.

—THE Law Magazine and Review (London) reviews Dr. Wharton's treatise on Negligence at considerable length, and takes leave of it with the assurance that it has not been able to detect even *levissima culpa* in his work.

—W. J. HICKS, Esq., author of a valuable treatise on chancery practice in Tennessee, has contributed a well-considered paper to the law department of the Nashville Commercial Reporter, reviewing at length an article by Mr. Tilman, which appeared in that journal for February 18th, on the "Administration of Insolvent Estates in Chancery under the Tennessee Code."

—THE Law Magazine and Review (London), in reviewing the third edition of Hilliard on Injunctions, says: "Mr. Hilliard's treatise is one with which we are very much gratified in its general features and contents. Its method is admirable, its style concise and clear, its references are accurate, and its contents exhaustive. As containing the American decisions more fully than any other existing treatise that is procurable in England, it is a welcome edition to the library of the English lawyer. As it has now reached the third edition, further commendation of it on our part is unnecessary."

—THE first judicial exposition of the civil rights act, has been given by Mr. Circuit Judge Emmons, to the grand jury of his court at Memphis, Tennessee, they having asked for specific instructions upon it. Judge Emmons did not heistate to declare the act unconstitutional, taking the same ground as that taken by Senator Carpenter in his speech against the bill. He discusses and applies the decision in the slaughter-house case, and shows that the legislation involved in the civil rights act, does not come within the scope of federal legislation—that the offences, if offences at all, are against the state, not the general government. We shall publish his charge next week.

—THE Albany Law Journal says: "The president has nominated Isaac C. Parker, of Missouri, to be chief justice of Utah, in place of Chief Justice McKean, removed. It is announced that the government, in the removal of Judge McKean, does not intend to abandon its policy in regard to polygamy —though what that policy is, can not be determined by any of its results. Ever since the appointment of Judge McKean difficulties have arisen in the administration of justice, and in the settlement of the jurisdiction of courts in Utah. The frequent conflicts between the various interests has rendered the administration of justice no easy matter. Judge McKean has made it uncertain and more difficult by his want of discretion and his non-judicial temperament. We know nothing of the judicial qualifications of his successor; but it is to be hoped that he will be able to exercise that discretion, moderation and insight which have long been wanting in Utah." Judge Parker is spoken of by his political opponents in Missouri as a gentleman of high integrity.

—BILLS have been introduced into the legislatures of Virginia and Tennessee, looking to the partial nullification of the civil rights law. The Virginia bill punishes persons who create disturbance in hotels, theaters and other places of amusement, after demand for accommodation and refusal. Theaters are permitted to issue non-transferrable tickets; and when the person not the original holder presents it for admission, he may be refused admittance, but the price of the ticket must be refunded to him. The Tennessee bill provides that hotels or inn-keepers, shall not be compelled to receive any person as a guest, nor be subject to any forfeiture, nor to any civil or criminal action for refusal. We assume, as a matter of course, that the legislature of Virginia and Tennessee, will have too much good sense to pass these bills. However unwise or unpolitic the civil rights law may be, it must stand as one of the paramount laws of the Union, until it is declared unconstitutional by the nation's highest court; and attempts to counteract or nullify it by state legislation should not be countenanced.

—JUDICIAL DISTRICT OF LOUISIANA.—The senate, after a debate of five hours, refused by a vote of 25 to 15, to confirm Mr. Pardee, as United States District Judge for the district of Louisiana; and having adjourned *sine die*, the position will necessarily remain vacant until the next session of Congress, as the President's power to make appointments to fill vacancies is restricted to such as occur during recess of the senate. Judge Durell's resignation, though received on the 2d day of December last, was not accepted until the 10th of December, at which date Congress had been in session three days. The tabling of Pardee's nomination, places litigation in an embarrassing position, as the district judge alone has jurisdiction in bankruptcy and admiralty cases. It is stated that there is now in hand of the register of the district court for distribution by order of the judge, about $72,000. Other suits in bankruptcy, involving about $200,000 are pending, and will have to await the appointment of a successor to Durell. The telegraph informs us that "Mr. Pardee has unconditionally withdrawn from the contest." We are glad to learn that he has become so modest. But since when has it become proper to enter into a "contest" for the office of United States District Judge? We had supposed that such an office should seek the man, and not the man the office.